

IN THE SUPREME COURT OF TEXAS

No. 06-0917

LAWRENCE HIGGINS, PETITIONER,

v.

RANDALL COUNTY SHERIFF'S OFFICE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

JUSTICE GREEN, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, dissenting.

The Texas Rules of Appellate Procedure require a party filing an appeal to pay a filing fee with the appellate court. TEX. R. APP. P. 5. Failure to pay the filing fee may result in dismissal of the appeal. *Id.* (“The appellate court may enforce this rule by any order that is just.”); *see also id.* 25.1(b), 42.3. But the rules also provide that an indigent appellant may be excused from paying the filing fee if he demonstrates by affidavit his inability to pay costs. *See id.* 20.1. Rule 20.1(b) states that the affidavit “must” contain “complete information” concerning eleven specific categories of information regarding the affiant’s financial condition. *Id.* 20.1(b). The question presented here is

whether, in the case of an affidavit violating Texas Rule of Appellate Procedure 20.1(b), Rule 20.1(f)¹ strips courts of appeals of their general sua sponte dismissal power.

The Court today concludes that it does, holding that when no contest is filed, any affidavit purporting to invoke indigent status is sufficient to avoid dismissal, no matter how deficient. I respectfully dissent because Rule 20.1 properly places the burden of proving indigence entirely on the party seeking that status and makes clear what that party must do to establish his inability to pay costs.² An affidavit that fails to comply with Rule 20.1(b) fails to establish indigence, whether or not a contest is filed.

Rule 20.1(f) does not create an exception to the court's power to dismiss an appeal when the affidavit violates Rule 20.1(b). Rule 20.1 contains three equally mandatory requirements, none less compulsory than another:

(a) Establishing Indigence. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

- (1) the party files an affidavit of indigence in compliance with this rule;
- (2) the claim of indigence is not contested or, if contested, the contest is not sustained by written order; and
- (3) the party timely files a notice of appeal.

¹ “Unless a contest is timely filed, no hearing will be conducted, the affidavit’s allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.” TEX. R. APP. P. 20.1(f).

² Contrary to the Court’s suggestion, whether or not “it appears from the record that the trial court was satisfied that Higgins was indeed indigent,” ___ S.W.3d ___, at ___, plays no part in our consideration of Higgins’s conduct at the court of appeals. The two processes are wholly independent, and must be evaluated as such. *See* TEX. R. APP. P. 20.1(a), (c).

Id. 20.1(a). The absence of an authorized contest alleviates *only* the (a)(2) burden of proving the affidavit’s allegation that the affiant lacks the actual ability to pay. *Id.* 20.1(a)(2), (f). Because the (a)(1) and (a)(3) requirements stand independently, affiants must *always* “file in compliance” with each component of Rule 20.1 and must *always* meet the deadline for filing a notice of appeal. Unlike (a)(2), neither (a)(1) nor (a)(3) contain any recognition of (f), and that difference must be given meaning. The absence of any language recognizing (f) in (a)(1) and (a)(3) means that (f) cannot dispense with those two requirements. It is unimaginable that the lack of a contest would absolve a petitioner’s failure to comply with appellate deadlines, as required by (a)(3), yet—without any basis in the language of the Rule—the Court somehow concludes that (a)(1) is subject to different treatment.

Rule 20.1(f) has nothing to do with an appellate court’s power to dismiss; it is about proof. Rule 20.1(g) provides that “[i]f a contest is filed, the party who filed the affidavit of indigence *must prove the affidavit’s allegations.*” *Id.* 20.1(g) (emphasis added); *see also id.* 20.1(h)–(i) (hearing procedures). Rule 20.1(f) “deem[s]” allegations “true” if no contest is filed. *Id.* 20.1(f). But an incomplete affidavit constitutes a defect regardless of whether its allegations are proven in a hearing under (g) or “deemed true” by operation of (f). *Id.* Because missing allegations cannot be deemed true, an incomplete affidavit violates the “complete information” requirement, *id.* 20.1(b), and the requirement of filing “in compliance with this rule,” *id.* 20.1(a)(1), justifying dismissal of the appeal.³

³ The Court suggests that before the adoption of Rule 20.1(b) and its requirement that affiants provide eleven specific pieces of information, “such information was already considered by the courts” in determining indigence. ___ S.W.3d at ___. But how could courts be considering information that affiants were not providing? This case is not the

We recognized this in *Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006) (per curiam), concluding that the court of appeals could dismiss Higgins's appeal if his affidavit's defects remained after a reasonable opportunity to correct. *Id.* at 899–900 (citing TEX. R. APP. P. 44.3 and *In re J.W.*, 52 S.W.3d 730, 733 (Tex. 2001) (per curiam)). We later affirmed *Higgins's* construction in *Hood v. Wal-Mart Stores, Inc.*, 216 S.W.3d 829 (Tex. 2007) (per curiam): “[U]nder Texas Rule of Appellate Procedure 44.3, a court of appeals *may not dismiss* an action due to a formal defect or irregularity *without first* allowing the petitioner reasonable time to cure the error.” *Id.* at 830 (emphasis added). We have never held, as the Court today does, that Rule 20.1(f) prevents courts from dismissing a case no matter how deficient the affidavit. *Higgins* concluded that if a reasonable opportunity to correct were provided, this court of appeals could dismiss Higgins's appeal because of this affidavit's defects. 193 S.W.3d at 899–900. The Court's citation to the *Higgins* opinion in support of today's decision is inexplicable.

The Court says that “[t]he method of ensuring fairness, permitting interested parties to contest the claim of indigence, has also been in place for more than a century,” implying that the Court's holding is in accord with our historical practice. ___ S.W.3d at ___. Even if true, this historical premise is not a license to ignore the text of the rule that governs today. Before 1997, Rule 40(a)(3) governed affidavits of indigence and required only that an affiant “state he is unable to pay

first to prove that affiants do not always provide the information required for accurate indigence determinations. *See, e.g., Johnson v. Harris County*, No. 14-03-00992-CV, 2004 WL 306088, at *2 (Tex. App.—Houston [14th Dist.] Feb. 19, 2004, no pet.) (mem. op.) (affiant failed to provide all 20.1(b) information); *Teague v. Southside Bank*, No. 12-03-00003-CV, 2003 WL 21356052, at *2 (Tex. App.—Tyler June 11, 2003, no pet.) (mem. op.) (affiant failed to provide all 20.1(b) information); *Thomas v. Olympus/Nelson Prop. Mgmt.*, 97 S.W.3d 350, 353 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (affiant failed to provide all 20.1(b) information). The failure of affiants to provide complete information is the reason that Rule 20.1(b) must exist and must be enforced.

the costs of appeal or any part thereof, or to give security therefor.” TEX. R. APP. P. 40(a)(3) (Tex. & Tex. Crim. App. 1986, amended 1990). If that were the rule we were still applying, the Court’s analysis would be more persuasive. But the 1997 promulgation of Rule 20.1 created two new requirements that we cannot ignore: Rule 20.1(a)(1), a *new requirement* that affiants “file an affidavit of indigence in compliance with this rule,” and Rule 20.1(b), a *new requirement* that affiants provide complete information about the eleven enumerated indicia of indigence. TEX. R. APP. P. 20.1(a)–(b). The Court refuses to recognize those changes because it prefers a different balance. That is not our role.⁴

In its interpretation of Rule 20.1(b), the Court converts mandatory terms into permissive suggestions without justification. According to the Court, “[d]epending upon the circumstances, certain types of financial information may be relevant and helpful to a court when evaluating a contested claim of indigence, including the following items described in Rule 20.1(b)” ___ S.W.3d at ___. Under that reading, when Rule 20.1(b) says that “[t]he affidavit must also contain complete information” about the eleven types of information, “must” really only means “may,” and even then only “depending upon the circumstances.” *Id.* at ___. That is not a “liberal construction” of the text, *id.* at ___; that is rewriting the text. If Rule 20.1(b)’s purpose was to require different showings in different circumstances, the text would have included more flexible terms. After all, the rules of appellate procedure should be interpreted as more than mere “relevant and helpful”

⁴ I agree with the Court that we ought not “elevate form over substance,” ___ S.W.3d at ___, and that is why I would adhere to the rule that courts of appeals must provide a reasonable opportunity to correct before dismissing appeals like Higgins’s. The reasonable opportunity to correct ensures that mere oversights and good faith errors are not subject to dismissal.

suggestions. ___ S.W.3d at ___. Rule 20.1(b) must be read to give litigants notice of what is actually required: An affidavit containing the eleven enumerated indicia of indigence, without exception.

As the Court endorses Higgins’s conclusory assertions of his inability to pay costs, *id.* at ___, it fails to recognize the critical omissions in his affidavit. Higgins’s affidavit says nothing about his spouse’s income, nothing about real or personal property, nothing about other assets, nothing about dependants, nothing about debts, nothing about monthly expenses, nothing about the ability to obtain a loan, and nothing about an attorney. *See* TEX. R. APP. P. 20.1(b)(2), (b)(3), (b)(5)–(11). Yet under the Court’s rule, Higgins could have three yachts, a millionaire spouse, and two parents who would gladly loan him the money, while still proceeding as an indigent. Rule 20.1(b) stands for the proposition that an accurate indigence inquiry *always* requires *all* of the Rule 20.1(b) information. Without it, neither we nor the potential contestants can conduct a meaningful evaluation of the litigant’s indigence. Even if “‘common sense’ supports the notion that an incarcerated individual is highly unlikely to qualify for loans,” ___ S.W.3d at ___ (quoting *Higgins*, 193 S.W.3d at 900), no part of our jurisprudence recognizes an inmate exception to Rule 20.1. Instead, we require individualized determinations precisely because assumptions and likelihoods are inaccurate predictors of actual need. *See Gibson v. Tolbert*, 102 S.W.3d 710, 713 (Tex. 2003). “[I]f the courts allow the privilege granted [by the indigent cost rules] to be abused by those who, in fact, ought to pay, this may lead to the abolition of the exemption.” *Pinchback v. Hockless*, 164 S.W.2d 19, 20 (Tex. 1942). Under Rule 20.1, courts ought not make the choice of whether to challenge the claim

of indigence, but they ought to be able to ensure that the choice belonging to the contestants is a meaningful one.

The Court's decision today changes the balance struck by Rule 20.1 and departs from the Rule's clear mandates. We ought not overrule *Higgins* and *Hood* less than two years after their issuance. I would hold that the court of appeals did not abuse its discretion by dismissing this appeal because Higgins's affidavit of indigence was defective on its face, and because Higgins was given a reasonable opportunity to correct his affidavit of indigence and failed to do so.⁵ Because the Court does not, I respectfully dissent.

PAUL W. GREEN
JUSTICE

OPINION DELIVERED: May 16, 2008

⁵ Without explanation, the Court today approves an affidavit of indigence filed in the wrong court. *See* TEX. R. APP. P. 20.1(c)(1)–(2) (affidavits of indigence for appeals must be filed in the trial court). Since I would hold that the violation of Rule 20.1(b) justifies the court of appeals' dismissal, I need not address whether the previous proceedings in this matter justify this strange result. *See Higgins*, 193 S.W.3d 898; *cf. Hood*, 216 S.W.3d 829 (approving an appellant's affidavit of indigence filed in the court of appeals).